

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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UNITED STATES OF AMERICA, : CR 07-736(S-2)  
: CR 08-044

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-against- :  
:  
United States Courthouse  
Brooklyn, New York

RICARDO FANCHINI, et al., :  
:  
:  
July 9, 2008  
Defendants. : 12:00 o'clock noon

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TRANSCRIPT OF MOTIONS  
BEFORE THE HONORABLE CHARLES P. SIFTON  
UNITED STATES SENIOR JUDGE

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4 Proceedings recorded by mechanical stenography, transcript  
5 produced by computer-aided transcription.  
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11 THE CLERK: Criminal cause for motion, the United  
12 States versus Fanchini, et al.

13 MR. SHARGEL: Good afternoon, Your Honor.

14 THE COURT: Good afternoon.

15 Why don't you have a seat? We have been making that  
16 a practice.

17 MR. SHARGEL: Sure. I can't break that habit, but I  
18 will. I will.

19 THE COURT: All right. Come on in and have a seat.

20 All right. United States against Fanchini.

21 Who is appearing for the government?

22 MR. TISCIONE: Steven Tiscione, Toni Mele, Licha  
23 Nyiendo for the government.

24 Good morning, Your Honor.

25 THE COURT: Just for purposes of the record, we've

1 got two cases, two separate cases on the calendar, 07-736 and,  
2 in addition, 08 criminal 44.

3 Who is here for Mr. Fanchini?

4 MR. SHARGEL: Gerald Shargel, Henry Mazurek and Evan  
5 Lipton.

6 THE COURT: All right. And for Nikolai Dozortsev?

7 MR. ZONE: Barry Zone for Nikolai Dozortsev.

8 Good afternoon, Your Honor.

9 THE COURT: Good afternoon.

10 And for Arthur Dozortsev?

11 MR. SAPONE: Edward Sapone.

12 Mr. Dozortsev is present in court.

13 How are you, Your Honor?

14 THE COURT: Okay. We've got two motions here, or  
15 two sets of motions, motions for severance by the defendants  
16 in the more -- well, it is 736, right, the second superseding?

17 MR. TISCIONE: That is correct, Your Honor.

18 THE COURT: And a motion by the government for  
19 consolidation of that case and 08 criminal 44.

20 Let's start and hear from the defendants. I will  
21 give the government an opportunity to respond and then make  
22 any arguments that it wishes to make in favor of its motion  
23 and get things worked out.

24 All right. Among the defendants, have you made any  
25 arrangements as to who is going to go first?

1 MR. MAZUREK: Judge, Henry Mazurek on behalf of  
2 Mr. Fanchini.

3 THE COURT: Okay. We've started the practice  
4 recently in the courthouse of having everybody speak from  
5 their counsel table, since that is a little easier for the  
6 marshals to deal with. Have a seat.

7 Go ahead.

8 MR. MAZUREK: Yes. Thank you, Judge.

9 Henry Mazurek on behalf of Mr. Fanchini. I will be  
10 arguing the Rule 8(b) severance motion on behalf of  
11 Mr. Fanchini on the second superseding indictment in the  
12 07 CR 736 case.

13 Your Honor, the issue before the Court is actually a  
14 fairly simple one, a direct one; that is, that in the second  
15 superseding indictment, the government added three counts to  
16 the indictment, counts nine through eleven, charging the  
17 codefendants Nikolai and Arthur Dozortsev in a health care  
18 fraud. Actually, two separate health care frauds; one against  
19 each of the codefendants; and then a felon in possession of a  
20 firearm charge in Count Eleven against codefendant Nikolai  
21 Dozortsev.

22 The issue before the Court under Rule 8(b) under  
23 which Mr. Fanchini moves is whether these additional counts  
24 against these defendants are properly joined under the rule  
25 which requires that the offenses, or the defendants that are

1 joined are joined in the same act or transaction, or in the  
2 same series of acts or transactions, that constitute an  
3 offense or offenses.

4 In this case, Your Honor, there is no connection on  
5 the face of the indictment between these Medicaid frauds in  
6 counts nine and ten and the felon in possession of a firearm  
7 charge.

8 What the government appears to argue, and somewhat  
9 of a moving target, the government submitted papers last  
10 evening in which they changed their argument from their  
11 original opposition papers and seemed to be arguing at this  
12 time that the health care frauds in counts nine and ten should  
13 be joined -- are properly joined in this indictment because  
14 the Count Eight in which Mr. Fanchini is charged jointly with  
15 the Dozortsev defendants charges that the specified unlawful  
16 activity, the health care fraud referenced in counts nine and  
17 ten.

18 I would argue, Your Honor, as argued in the papers,  
19 that this is not enough. This is still too tenuous a  
20 connection to allow the government to join these defendants  
21 on a completely unrelated scheme from the narcotics offenses  
22 that are charged as the primary focus of the indictment.

23 What the government would have you -- would have  
24 this Court believe is that simply because they allege it in  
25 Count Eight, that that's sufficient with respect to joining

1 the counts nine and ten.

2 I refer the Court again to the Biaggi decision in  
3 the Second Circuit in which the Second Circuit analyzed a tax  
4 versus non-tax offense, arguing or in -- setting forth a  
5 principle that if the tax count does not have, or has only a  
6 small amount of the unreported income that's charged in the  
7 tax count, relating back to the non-tax count proceeds of  
8 fraud that was charged in that case, then that still is not  
9 enough of a connection to include both of those counts within  
10 the same indictment.

11 That principle that was first put forth in Biaggi  
12 was again reinforced in a footnote in the more recent Second  
13 Circuit decision in Shellef.

14 In this case, Your Honor, it is -- there is no  
15 similar pattern of the offenses that the Second Circuit has  
16 held is a linchpin of determining whether the joinder of  
17 defendants is proper as in some of the other Second Circuit  
18 cases that we have cited and now the government has cited in  
19 the most recent submission.

20 You have, as best we can tell from the allegations  
21 in the indictment, a Medicaid fraud that is not even a  
22 conspiracy between the two Dozortsev defendants. They are  
23 separately charged in two independent counts, in counts nine  
24 and ten, and from the government's papers it is  
25 initially -- initially they describe those offenses as the

1 Dozortsev defendants submitting Medicaid  
2 applications -- affidavits with -- showing that they were  
3 eligible for the benefits but were not because the government  
4 claims that they had -- they had additional assets and income  
5 that they were not reporting in these affidavits.

6 It is hard to see how this is a common plan or  
7 scheme with the international narcotics transactions that are  
8 charged throughout this indictment.

9 Also, with respect to the health care counts, there  
10 is no identity of participants. It seems, again, from how  
11 those counts are charged, that these are independent for  
12 personal submissions by the two Dozortsev defendants  
13 independently. Again, does not show the kind of connection in  
14 the same series of transactions or acts that Rule 8(b)  
15 requires.

16 Those are the arguments with respect to the two  
17 health care frauds.

18 But I would submit, Your Honor, that the government  
19 did not respond in their papers last evening to the -- the  
20 issue with respect to Count Eleven, which is the felon in  
21 possession of a firearm charge against Nikolai Dozortsev.  
22 Again, this count is not connected on the face of this  
23 indictment in any way with any of the other transactions or  
24 acts that are charged in the indictment. There is no  
25 allegation that the firearms found during a search of

1 Mr. Dozortsev's apartment, which appears to have happened at  
2 the time that they were executing his arrest, have anything to  
3 do or were used in connection with or in furtherance of the  
4 narcotics conspiracies charged back in the 19 -- largely in  
5 the 1990s in the earlier parts of the indictment.

6 So with respect to that last count, Your Honor, the  
7 government doesn't even attempt, it appears, to show how the  
8 felon in possession of a firearm count, added as almost an  
9 afterthought, based on evidence found at the time of  
10 Mr. Dozortsev's arrest, would be connected in the same series  
11 of transactions or acts that are charged in the international  
12 narcotics trafficking scheme which makes up the primary part  
13 of this indictment.

14 With that said, Your Honor, again, I think that as a  
15 result of the government's failure to show the connections  
16 between these latter counts and the Dozortsev defendants with  
17 the other counts that are charged against Mr. Fanchini in the  
18 indictment, that the Court under Rule 8(b), which is not, I  
19 repeat again, is not a determination of whether the defendants  
20 are prejudiced under the standard of Rule 14, that the  
21 Rule 8(b) standard has not been met to permissibly join these  
22 defendants based on the latter three counts that have been  
23 added to the indictment.

24 THE COURT: Okay. Among the Dozortsev defendants,  
25 is there anything you want to say or add?



1 MR. ZONE: I will start with respect to counts nine  
2 and eleven to the health care fraud and the felon in  
3 possession counts that are clearly improperly joined.

4 With respect to the felon in possession count,  
5 the -- the rifles recovered were hunting rifles and the count  
6 is a felon -- the felony that the government relies on is a  
7 twenty-year old tax conviction. Clearly, there is no view  
8 that these -- that this count belongs in this indictment at  
9 all. Any jury listening to a case like this where guns are  
10 found in the home of the defendant will just view him as just  
11 a pure criminal having guns.

12 With respect to the health care fraud, it was  
13 initially my understanding, and my reading of the count in the  
14 indictment, that he had improperly obtained Medicaid benefits,  
15 and again, the appearance to any jury listening to the counts  
16 in this indictment, the evidence that you would expect  
17 relative to these counts, would just say well, you have drugs.  
18 You have money laundering. You have guns. You have health  
19 care fraud. There just can be no fair view, no fair view by a  
20 jury, or no fair trial of this case as to Mr. Dozortsev,  
21 Nikolai Dozortsev, should these two counts remain in this  
22 indictment.

23 It is clear, that they should be severed under  
24 Rule 8(a). They don't belong here.

25 Clearly, if there is some crazy argument that there

1 is some connection between the health care fraud and the guns,  
2 then clearly the prejudice is astronomical.

3 With respect to the -- to their now being joined in  
4 this second or third superseding indictment, the original  
5 indictment included a year's worth of conduct that included  
6 monetary transactions and attempted drug conspiracy and we  
7 have received discovery relative to that one year of conduct.

8 Seventeen years of criminal activity was alleged in  
9 the first indictment and now in the superseding indictment  
10 apparently there are seventeen years worth of money laundering  
11 and drug transactions, and I would say that all of that  
12 evidence and all of that discovery information out of Europe  
13 has nothing to do with Nikolai Dozortsev and the stretch that  
14 the government has made is -- to just throw as much junk into  
15 this basket and just see what sticks, I -- it is just  
16 disjointed. It doesn't make sense.

17 Clearly, they don't belong together as codefendants.  
18 Specifically, the prejudicial effect on Nikolai Dozortsev of  
19 seventeen years of this money laundering and drug evidence  
20 that the government supposedly had would just destroy and burn  
21 Mr. Dozortsev, Nikolai Dozortsev, who has been charged very  
22 specifically with small pieces of the money laundering, drug  
23 offenses. Clearly, those counts should be severed and they  
24 shouldn't be codefendants.

25 THE COURT: Okay. On behalf of Arthur Dozortsev?

1 MR. SAPONE: Yes.

2 Good afternoon, Your Honor. Edward Sapone for  
3 Arthur Dozortsev.

4 I respectfully join, with the Court's permission, in  
5 both Mr. Fanchini's and Nikolai Dozortsev's motions and do not  
6 want to repeat much of what has been said, but I would like to  
7 add that Arthur Dozortsev certainly is not -- doesn't belong  
8 in this most recent indictment ending in 736 under Rule 8(b).  
9 The reason plainly for that is that we don't have a common  
10 scheme or plan existing between the approximately eight crimes  
11 with which Mr. Fanchini is alleged to have committed, ranging  
12 from engaging in a continuing criminal enterprise conspiracy  
13 to import cocaine, heroin and MDMA, conspiracy to distribute  
14 three -- those same three narcotics, to import them, is five  
15 kilograms of cocaine that's allegedly imported and the charges  
16 go on and on.

17 Plainly, the government alleges that this enterprise  
18 existed from 1990 through October of 2007, when in fact, in  
19 the indictment just prior to the 736 indictment, Arthur  
20 Dozortsev was only charged with conspiracy to launder money in  
21 a seven-month period in 2007, from March to October.

22 In the most recent 736 indictment, all of a sudden  
23 we have Arthur thrust into this tremendous indictment, where  
24 crimes allegedly occurred back in 1990 when he was in Arizona  
25 and he was only eighteen years of age, when there is no

1 evidence whatever that he even knew Mr. Fanchini, let alone  
2 formed any illegal agreement to commit any crime against the  
3 United States.

4 There is no common scheme or plan or purpose  
5 involved in these eight narcotics related offenses and a money  
6 laundering -- alleged money laundering conspiracy  
7 seventeen years later.

8 So under 8(b), because there is no common scheme or  
9 plan, there are separate conspiracies, quite frankly, meaning  
10 the alleged Fanchini activity, the eight alleged crimes I just  
11 spoke of, and the one money laundering conspiracy with which  
12 Arthur Dozortsev is charged, those conspiracies are separate.

13 I think the Kotteakos case versus the United States,  
14 US Supreme Court 1946, is instructive. In Kotteakos,  
15 admittedly there were about 35 defendants in eight separate  
16 conspiracies, but the Court explained very clearly that where  
17 you have separate conspiracies and the government wants to  
18 charge them all into one grand conspiracy but the evidence is  
19 different and really bears out separate and distinct  
20 conspiracies, then it denies the defendant a fair trial and  
21 due process.

22 Here, the government claims that they have four  
23 months of evidence to bring before a jury for Mr. Fanchini and  
24 Mr. Dozortsev, and what we have is Mr. Artie Dozortsev charged  
25 with merely conspiracy to money -- launder money for a

1 fifty-seven month period seventeen years later.

2 What we would have here are two separate  
3 conspiracies. We would have conspiracy number one, which is  
4 the alleged Fanchini-Nikolai Dozortsev conspiracy that lasted  
5 for all those years and included all these alleged drug  
6 offenses, and then a separate conspiracy within which Artie is  
7 alleged to have laundered money at the tail end of it.

8 So under a Kotteakos rubric we have separate  
9 conspiracies and, therefore, they shouldn't be joined  
10 together. Under 8(b) we don't have a common scheme or plan or  
11 a link that exists between all these alleged drug offenses and  
12 continuing criminal enterprise offenses and the ultimate  
13 alleged money laundering.

14 For those reasons, Artie just doesn't belong in this  
15 indictment.

16 THE COURT: Artie?

17 MR. SAPONE: Artie Dozortsev. Sorry. Arthur.

18 THE COURT: Let's --

19 MR. SAPONE: In any event, Your Honor, I -- if --

20 THE COURT: Just as a matter of general practice, in  
21 my courtroom, as litigants will tell you, we talk about people  
22 by their full name or their last name. Don't try for a level  
23 of informality in a serious matter of this sort.

24 All right. Anything further?

25 MR. SAPONE: Yes, Your Honor.

1 Even if the Court finds that joinder is proper under  
2 8(b), under Rule 14 there should be a severance of Arthur  
3 Dozortsev from the indictment because the substantial  
4 spillover prejudice that would result would deny him a fair  
5 trial. There would literally be three months and three weeks  
6 of testimony not against him but against Mr. Fanchini and  
7 Nikolai Dozortsev. No limiting instruction, I most  
8 respectfully suggest, could cure that.

9 Arthur Dozortsev is simply charged with having  
10 engaged in an agreement to receive \$1 million of money which  
11 were the proceeds of unlawful activity. That would be a  
12 one-week trial.

13 The government will argue that they have to prove  
14 the specified unlawful activity that Mr. Fanchini and Nikolai  
15 Dozortsev engaged in for the seventeen years preceding March  
16 to October of 2007 in order to prove that aspect of the  
17 Artie -- Arthur Dozortsev money laundering, but it is simply  
18 not so. They have to show that Arthur Dozortsev had knowledge  
19 that the two wire transfers that he allegedly received on  
20 behalf of Mr. Fanchini was the product of some unlawful  
21 activity. That doesn't take four months to do. So for three  
22 months and three weeks I suggest the -- the evidence would be  
23 not against him but against the other two defendants who I  
24 named and the spillover of that would be impossible for him to  
25 overcome.

1           Finally, Your Honor, under Rule 8(a), what we have  
2 here in the 736 indictment is Arthur Dozortsev is only charged  
3 with in Count Eight and Count Ten. Eight is conspiracy to  
4 commit money laundering, which I have spoken about, and ten is  
5 a health care fraud claim.

6           Under Rule 8(a), those two charges are not properly  
7 joined in one indictment. The health care fraud claim has  
8 absolutely nothing to do with the money laundering claim. The  
9 government I think has already identified where they believe  
10 that million dollars came from that allegedly ended in Arthur  
11 Dozortsev's account. It had nothing to do with any health  
12 care fraud claim.

13           To stick a health care fraud accusation in with  
14 conspiracy to commit money laundering claim in one indictment  
15 is just not proper joinder.

16           The prejudice then under Rule 14 would also result,  
17 if Your Honor were to find joinder to be proper under Rule 8,  
18 in that a jury would look at Arthur Dozortsev and figure well,  
19 he's accused of health care fraud and conspiracy to commit  
20 money laundering and there is prejudice in those two unrelated  
21 crimes being joined in the same case.

22           So, for all those reasons, I respectfully join in my  
23 cocounsel's motions and ask Your Honor to sever Arthur  
24 Dozortsev from his codefendants under Rule 8(b) and to sever  
25 the two distinct and separate counts, both Count Eight and

1 Count Ten, in the 736 indictment.

2 Thank you.

3 MR. TISCIONE: Thank you, Your Honor.

4 I will respond first to the charges made by all  
5 three defendants, that counts nine through eleven of the  
6 indictment should be -- of the superseding indictment should  
7 be severed. Those are the health care fraud and the firearm  
8 charges.

9 With respect to the health care fraud charges, there  
10 is no basis for severance for several reasons.

11 As the defendants concede in their own papers,  
12 Rule 8(b), the law under Rule 8(b) is very clear; that in  
13 deciding whether joinder is proper under Rule 8(b), the  
14 district court may look only to the allegations in the  
15 indictment and not to any factual claims made by the parties  
16 about the evidence that will or will not be presented at  
17 trial.

18 As the defendants concede, the superseding  
19 indictment here specifically charges health care fraud as a  
20 specified unlawful activity underlying the money laundering  
21 conspiracy against all three defendants.

22 Thus, the evidence of substantive health care fraud  
23 violations will be admissible against all three defendants  
24 regardless of whether there is a joint or separate trial and  
25 the allegations on the face of the indictment are sufficient



1 to permit joinder under Rule 8(b).

2 The defendants rely on several cases that are  
3 completely inapposite. They rely specifically on United  
4 States versus Biaggi and United States versus Shellef. Both  
5 of those are inapposite for two reasons.

6 First, they both deal with joinder of tax evasion  
7 counts to non-tax offenses, which as the Shellef court noted,  
8 is governed by a more strict standard for joinder. As the  
9 Second Circuit explained in Shellef, joinder of tax charges  
10 with non-tax charges under Rule 8 is permissible only if the  
11 tax offenses arose directly from the other offenses charged,  
12 such as when the funds derived from the acts underlying the  
13 non-tax charges, either are or produce the unreported income  
14 that is the basis for the tax charge.

15 In this case there are no tax charges. What's  
16 charged here are substantive health care fraud violations that  
17 form the basis for part of the money laundering conspiracy  
18 that's charged in Count Eight.

19 The second reason why both of those cases are  
20 inapposite is in Biaggi the Court found the joinder was proper  
21 with those counts and in Shellef the Court found that joinder  
22 was proper for all counts in which the tax fraud -- the tax  
23 evasion was based on proceeds from the unlawful activity.

24 The one count that the Court in Shellef found was  
25 misjoined was because none of the proceeds from the unlawful

1 activities -- the substantive counts led to that tax evasion  
2 count. In fact, the tax evasion count was for a period of  
3 time before the alleged conspiracy for the substantive crimes  
4 even occurred.

5 There was absolutely no connection and simply it is  
6 not this case. In this case the indictment specifically  
7 charges that health care fraud was one of the specified  
8 unlawful activities of the money laundering conspiracy which  
9 is against all three defendants.

10 With respect to the firearm charge, the Court -- the  
11 government would agree, that it is a closer issue with respect  
12 to joinder, and we would agree to sever that count with  
13 respect to Mr. Nikolai Dozortsev into a separate trial. We  
14 would expect that trial would last a day, two at the most; and  
15 the government is ready to proceed on that trial whenever it  
16 is convenient for the Court.

17 With respect to the entire rest of the indictment, I  
18 think the best arguments for why all of these defendants need  
19 to be joined into one single trial is actually made by the  
20 defense counsel in their motion asking the Court permission to  
21 conduct joint defense meetings in this case when they are on  
22 separate indictments. Clearly, at that time all the  
23 defendants contemplated that there was an overlap in  
24 commonality between the charges, which is borne out by the  
25 fact that the superseding indictment now charges all three

1 defendants in the same conspiracy charge.

2 In fact, I can't make the argument for consolidation  
3 or joinder better than Mr. Shargel did in his own motion. The  
4 charges against all three defendants arise out of the same set  
5 of facts and circumstances and the same common scheme or plan.  
6 They are all charged in the same money laundering conspiracy.

7 Moreover, as explained in the government's papers,  
8 the evidence overlaps for all of these defendants and will be  
9 virtually the same regardless of whether they are tried  
10 jointly or in separate trials.

11 As Mr. Shargel also pointed out in his motion  
12 seeking joint defense meetings, there are considerable  
13 benefits of judicial resources being conserved here. A joint  
14 trial would save the parties and the Court from two virtually  
15 identical four-month trials, trials that would involve the  
16 same witnesses and the same evidence. And I would point out  
17 that many of the witnesses in these trials would have to  
18 travel internationally to come here and testify in the US.

19 Those are exactly the type of institutional  
20 interests that the Supreme Court has recognized as creating a  
21 presumption of joint rather than separate trials with  
22 defendants who are properly joined in a single indictment.

23 The defendants Nikolai and Arthur Dozortsev also  
24 seek severance because of the potential spillover prejudice.  
25 Under Second Circuit law, the defendants have an extremely

1 difficult burden. They must demonstrate that a  
2 constitutionally fair trial would be impossible if they are  
3 tried jointly.

4 The defendants have not come close to satisfying  
5 this burden. They have not identified even a single piece of  
6 evidence that would be inadmissible against them in a separate  
7 trial, much less the extraordinary prejudice required under  
8 the law.

9 The very nature of the money laundering charge  
10 virtually guarantees that the evidence will be the same  
11 against all three defendants. In order to prove that the  
12 laundered funds were the proceeds of unlawful activity, the  
13 government would present the same evidence of narcotics  
14 trafficking, cigarette smuggling and health care fraud. That  
15 evidence will be presented against Ricardo Fanchini, Arthur  
16 Dozortsev and Nikolai Dozortsev, either in a single trial or  
17 in separate trials against each defendant.

18 It is not the case that the money laundering charges  
19 against Arthur Dozortsev and Nikolai Dozortsev encompass only  
20 a seven-month period or that they are just two wire transfers.  
21 Rather, they encompass a conspiracy lasting more than a decade  
22 involving tens of millions of dollars and numerous money  
23 laundering transactions.

24 The \$1 million Mr. Sapone was referring to was  
25 simply the government's plea offer to his client and it has

1 nothing to do with the actual evidence that will be presented  
2 at trial.

3           The government has evidence that Nikolai and Arthur  
4 Dozortsev were involved in laundering illegal proceeds for the  
5 Fanchini organization as far back as 1997, which covers nearly  
6 the entire period of criminal conduct charged in the  
7 indictment against Fanchini.

8           Nikolai Dozortsev is also charged in a number of  
9 drug transactions, including several violations dating back to  
10 1997 as well.

11           These are expanded charges. They are charges that  
12 are more expansive, greater than the charges that were in the  
13 original indictment against both Dozortsevs and because they  
14 are now charged in the superseding indictment with these  
15 expanded charges, the original charges in that indictment  
16 against them are irrelevant.

17           I don't know if Your Honor would like me to address  
18 this now, but the defense counsel for Mr. Fanchini also raised  
19 another issue with respect to the potential disqualification  
20 of Robert Wolf, who is one of Nikolai Dozortsev's attorneys.  
21 I would be happy to address the government's response to that  
22 argument now, if Your Honor wishes.

23           THE COURT: No. You responded in the papers. This  
24 is an opportunity to respond to oral argument. I didn't hear  
25 any oral argument on that. If you want to rest on the papers,

1 that's fine.

2 MR. TISCIONE: Yes, Your Honor. The government  
3 would simply rest on its papers then.

4 THE COURT: Okay. Anything more you all want to say  
5 by way of reply?

6 MR. MAZUREK: Yes, Judge.

7 Henry Mazurek on behalf of Mr. Fanchini.

8 I just want to reply to the specific argument that  
9 the government has made with respect to why the health care  
10 fraud counts against the two Dozortsev defendants should  
11 remain in the S-2 indictment.

12 The government would have this Court limit the  
13 holdings in Shellef, or reasoning in Shellef, and in Biaggi to  
14 only tax cases. I think that that would be incorrect to do  
15 because the wrong goes well beyond just the narrow facts of  
16 those two cases. Specifically, here the reasoning is  
17 even -- is more relevant because we are talking about money  
18 laundering versus substantive offenses, which are very  
19 analogous to the kind of reasoning that was done in the  
20 Shellef and Biaggi cases relating tax cases to -- tax counts  
21 to substantive counts.

22 The reason for that is that in both the money  
23 laundering and tax scenarios, you deal with proceeds that have  
24 been received from unlawful activities, that -- and in Shellef  
25 and in -- in Biaggi --

1 THE COURT: Sometimes it's from legal activities  
2 too.

3 MR. MAZUREK: Absolutely, Your Honor. I am just  
4 dealing with the allegations at this stage that we have to  
5 deal with in terms of the allegations in the indictment.

6 THE COURT: No. I think the point is, I suppose the  
7 thinking is that almost any time you have a criminal activity  
8 which produces income you can tack on in almost all cases a  
9 tax count since it is unlikely it would have been reported. I  
10 hope it is not the situation that every time we have illegal  
11 proceeds from a crime that it gets laundered. Anyway, it  
12 seems --

13 MR. MAZUREK: These days it seems like the  
14 government is using that tact. Perhaps the recent Supreme  
15 Court decision in Santos will preclude them from doing that as  
16 often as they have been.

17 With respect to -- a specific argument the  
18 government has made on the Biaggi and Shellef cases, they  
19 argue that simply because they allege the health care fraud as  
20 a specified unlawful activity in the money laundering  
21 conspiracy count, then that's the end of the story with  
22 respect to Rule 8 argument.

23 I would refer the Court again back to the  
24 dicta -- to dicta in Biaggi that was reinforced in a footnote  
25 in Shellef -- in footnote 13 in Shellef. The issue in Biaggi

1 was that there was a tax count connected to extortion counts  
2 in the indictment. The Second Circuit ruled that the tax  
3 count against one of the defendants was properly joined in the  
4 indictment because the unlawful -- the unreported proceeds  
5 came from the primary extortion that was charged in the  
6 indictment.

7           However, in that case the Second Circuit went on to  
8 say that, hold on. There is a limiting principle to that.  
9 And that is, if in fact the tax count that was added on had  
10 primarily, or in the words of the Shellef case which cited to  
11 Biaggi, if it weren't for the fact that the overwhelming  
12 majority of the unreported income had not been -- had been  
13 part of the tax count, then it is not so clear that those  
14 counts were properly joined.

15           If the overwhelming majority of the proceeds in the  
16 tax count had come from an unrelated extortion, the Second  
17 Circuit in Biaggi said, those counts may not be properly  
18 joined. Of course, they were talking in the hypothetical  
19 sense since it was the converse that that -- that were the  
20 actual facts in that case.

21           Again, Shellef reinforced that hypothetical scenario  
22 that was presented in -- first in Biaggi and again stated  
23 that -- if I can quote from that case? Again noting  
24 hypothetically that if the trial had focused on the unrelated  
25 extortion joinder of a tax count based largely on the



1 unreported Wedtech extortion, which was the primary extortion  
2 in this case, joinder may be improper.

3 That is what we have in this case, Your Honor. The  
4 government in Count Eight, as prior counsel has -- my  
5 cocounsel have indicated, have set forth this overarching  
6 conspiracy expanding seventeen years. They add two counts of  
7 substantive health care fraud individually against the two  
8 Dozortsev defendants spanning a time period of approximately  
9 four years. On -- taking the government's argument, that you  
10 can't look beyond the allegations of the indictment, which I  
11 suggest, while one case may have noted that in dicta, is not  
12 the way that other cases have decided these issues, the -- the  
13 small amounts of the proceeds from this alleged personal  
14 health care fraud against the two Dozortsev defendants pale in  
15 comparison to the seventeen years of millions of dollars of  
16 alleged money laundering that was conducted through extensive  
17 international narcotics trafficking.

18 To tie these two together based on that -- on that  
19 very, very thin reed, I would suggest, is exactly the kind of  
20 scenario that was foreseen by both the Biaggi court and  
21 reinforced again by the Shellef court.

22 THE COURT: Okay. Yes, sir? Go ahead.

23 MR. ZONE: I would just say with respect to proceeds  
24 of specified unlawful activity in the health care fraud, my  
25 understanding of this count is that they received illegal

1 benefits, Medicaid benefits. Those are the proceeds.

2 THE COURT: That's what I understood.

3 MR. ZONE: That's what I understood.

4 I don't know how those proceeds now become  
5 translated into some money that you should put into a bank  
6 account, just from a practical standpoint.

7 That's all I wanted to add.

8 MR. SAPONE: If I may take that ball and run with  
9 it, Your Honor, on behalf of Arthur Dozortsev.

10 Shellef is instructive, where it says that two  
11 separate acts are only joinable under 8(a) if they are of a  
12 similar character, based on the same act or transaction or  
13 part of a common scheme or plan.

14 So with respect to indictment seven -- ending in 736  
15 regarding Arthur Dozortsev, we have in Count Ten a health care  
16 fraud accusation, in Count Eight a money -- a conspiracy to  
17 commit money laundering.

18 Well, clearly that's not of a similar character. It  
19 is certainly not based on the same act or transaction, and  
20 there can't be a common scheme or plan.

21 I respectfully suggest, unless, as Mr. Zone points  
22 out, unless what Arthur Dozortsev did with respect to Count  
23 Ten was receive some sort of money from an insurance company,  
24 some Medicaid money, which he then tried to launder or engage  
25 in an agreement or conspiracy to launder, which simply is not

1 the government's proof.

2           The government will attempt to prove as to Count Ten  
3 that all Arthur Dozortsev did was obtain services. He was  
4 able to go to a doctor or a hospital. It was paid for by  
5 Medicaid. So certainly then the third prong, common scheme or  
6 plan is -- falls short too with respect to the government's  
7 ability to prove that because unless there is money to  
8 be -- an agreement to launder money that came from health care  
9 fraud, then there can't be a common scheme or plan linking  
10 one's receipt of benefits, i.e., going to a hospital or a  
11 doctor, and laundering money. So under 8(a), they should not  
12 be joined, counts eight and ten as they relate to Arthur  
13 Dozortsev.

14           THE COURT: How do you launder Medicaid benefits?

15           MR. TISCIONE: Your Honor, as --

16           THE COURT: According to your learning from the  
17 investigation in this case?

18           MR. TISCIONE: As the government attempted to  
19 explain in its most recent submission, Your Honor, the health  
20 care fraud charged in the indictment encompasses more than  
21 simply the receipt of personal Medicaid benefits on behalf of  
22 the Dozortsevs and their family members.

23           The health care fraud charges also include a scheme  
24 in which Nikolai and Arthur Dozortsev along with several  
25 unindicted coconspirators defrauded Medicaid by submitting

1 false and/or inflated claims for benefits through medical  
2 companies they were associated with. Wiretap interceptions  
3 and surveillance established --

4 THE COURT: What you are talking about is not the  
5 benefits. You are talking about the profits made by these  
6 companies?

7 MR. TISCIONE: It is both, Your Honor. I would --

8 THE COURT: How are --

9 MR. TISCIONE: I would agree that's --

10 THE COURT: Benefits would --

11 MR. TISCIONE: For the benefits, I would agree, that  
12 the benefits would not be part of laundering. However, the  
13 health care fraud charges also encompass the cash payments  
14 that Nikolai and Arthur Dozortsev -- that were their share of  
15 the profits from this health care fraud that were then  
16 laundered.

17 THE COURT: All right. You say that was laundered?

18 MR. TISCIONE: That was laundered through the  
19 same --

20 THE COURT: Is there anything else you want to say  
21 by way of response or not?

22 MR. TISCIONE: No, Your Honor.

23 THE COURT: All right.

24 MR. TISCIONE: Actually, I do want to respond to one  
25 thing raised by Mr. Mazurek.

1           He continues to rely on the Shellef case. I would  
2 simply point out the difference here is that, unlike in  
3 Shellef, the indictment in this case specifically charges that  
4 all three defendants laundered the proceeds of the substantive  
5 health care fraud.

6           In Shellef, the Court was dealing with a situation  
7 where the tax fraud happened before the substantive  
8 allegations were even alleged to have occurred. So there is  
9 clearly no connection there between the tax evasion which  
10 occurred before the substantive crimes were committed.

11           In this case, we have substantive crimes that were  
12 committed during the same period as the money laundering  
13 conspiracy and they are specifically alleged in the  
14 indictment, that the money laundering conspiracy involved  
15 laundering proceeds of those specified health care fraud  
16 violations.

17           THE COURT: Okay. I must say, I don't find the  
18 resolution of the motions as difficult as perhaps is going  
19 through all your papers.

20           I am going to deny both motions; that is, I am going  
21 to deny the motions for severance and deny the motion for  
22 consolidation as moot.

23           On the severance motions, it appears to me that  
24 there is a basis for concluding that the charges are properly  
25 joined because of this alleged overarching common scheme or

1 continuing criminal enterprise, which had as part of its  
2 essence money laundering, in which on the basis of the  
3 allegations everybody joined.

4 I don't see a basis for Mr. Fanchini's application  
5 for severance because of the possibility that at some point he  
6 will wish to call Mr. Wolf. First of all, because I have no  
7 idea as to what sort of evidence it is intended to be  
8 presented through Mr. Wolf, and, secondly, because it seems to  
9 me that there are a substantial number of hurdles before we  
10 get around to disqualifying him.

11 With respect to the Dozortsevs' motions, it is  
12 obviously a different set of allegations made in the more  
13 recent charges than were made originally, but the basis for  
14 the expansion not only in time but in charges appears on the  
15 face of it to be the joint activity, the conspiracy, the  
16 continuing enterprise, of money laundering of a variety of  
17 different criminal activities, including if the government  
18 position is well taken, laundering of proceeds that were the  
19 product of Medicaid fraud.

20 I am glad to hear that the government is itself  
21 consenting to severance of the gun charge. I will deal with  
22 that charge when, as and if the parties wish to take it to  
23 trial.

24 That brings me to the next matter, which is the  
25 issue of preparing for trial on the new indictment. I intend

1 to issue an amended pretrial order, which at this point will  
2 delay the trial of the Dozortsevs' case, or the charges  
3 against the Dozortsevs, to put it on schedule with the trial  
4 of the charges against Mr. Fanchini, with a trial at least at  
5 this point in mid-January and motions addressed to these new  
6 charges returnable September 15th, I think it is.

7 January 12th for the trial and September 15th for the pretrial  
8 motions.

9 I am going to enter an excludable order of delay  
10 because the Dozortsevs are now joined with a defendant as to  
11 whom the Speedy Trial Act period has not expired, a finding  
12 that the interests of trial preparation for the complex trial  
13 outweighs the interest of the defendants or the public in a  
14 more speedy disposition of the matter.

15 On discovery, as I noted the last time  
16 Mr. Fanchini's case was before me, the government is engaging  
17 in and is committed to continue a rolling discovery, which  
18 means that they will make discovery, Rule 16 discovery as it  
19 comes in to the government's possession; and I note that they  
20 have already done that with respect to discovery previously  
21 furnished to Mr. Fanchini.

22 The defendants are -- the Dozortsev defendants are  
23 not aware of it -- have been told and assume that there may be  
24 a delay in the production of discovery coming from other  
25 countries that is not yet in the possession or under the

1 control of the government. I have been assured that that  
2 process of getting that out of the hands of the foreign  
3 governments will be completed by October 1st?

4 MR. TISCIONE: That's our hope, Your Honor. That's  
5 what we are working towards.

6 THE COURT: As a result of that, any additional  
7 pretrial motions that are necessitated by the delay in  
8 discovery until October will form a basis for a new date for  
9 additional motions, if needed.

10 On the assumption, taking the same timeframe that we  
11 have been talking about earlier, fix an additional return date  
12 for motions of November 17th.

13 Now, it may be that either the motions or the  
14 discovery will not be promptly forthcoming through nobody's  
15 fault, that is, that having exercised due diligence in getting  
16 the discovery from other countries, it is shown that a brief  
17 additional adjournment will put people in a position to be  
18 better prepared for trial and, if so, I suppose we'd better  
19 start considering an alternative trial date if it has to be  
20 delayed. But that is something that, since it involves a  
21 number of busy attorneys and a number of moving parts,  
22 including the mechanics of dealing with foreign countries, I  
23 think we had better start on the process early on of  
24 determining when, as the play says, we shall next meet again,  
25 if we don't get together here January 12th, which I at this



1 point fully expect we will be able to do.

2 Unless there is something further, I've got a  
3 sentencing and --

4 MR. TISCIONE: Actually, Your Honor, Nikolai  
5 Dozortsev and Arthur Dozortsev need to be arraigned on the  
6 superseding indictment.

7 THE COURT: Yes. I'm sorry.

8 If there is no objection to this procedure, since we  
9 have been discussing what the new charges are, I will simply  
10 enter pleas of not guilty on both of those --

11 MR. ZONE: On behalf of Nikolai Dozortsev, thank  
12 you, Your Honor.

13 MR. SAPONE: I wish you a good afternoon.

14 Thank you, Your Honor.

15 THE COURT: Okay.

16 MR. SHARGEL: May I? I have one more thing to bring  
17 up, if I may.

18 I want to report to the Court on the conditions at  
19 the MDC. I want to first put on the record that finally  
20 yesterday Mr. Fanchini was moved to the west building.

21 THE COURT: Very good.

22 MR. SHARGEL: And despite the government's  
23 suggesting in a letter that they sent to you that counsel  
24 should be with Mr. Fanchini as he listens to conversations and  
25 reads papers, reads documents, I think we have worked this out

1 with Mr. Johnson at the MDC who said he would supply the  
2 laptop to Mr. Fanchini in the visiting room and counsel need  
3 not be present for that. Because it is common, as we have  
4 learned from earlier correspondence, it is common for inmates  
5 to be working in the visiting room with desktop computers. He  
6 is just going to add another computer that will be exclusively  
7 for use by Mr. Fanchini.

8 The one --

9 THE COURT: This came from the Bureau of Prisons or  
10 from --

11 MR. SHARGEL: That came from Mr. Johnson.  
12 Mr. Mazurek spoke to him after we received the letter from the  
13 government.

14 THE COURT: All right. Thank you.

15 MR. SHARGEL: One more thing. Finally, finally, I  
16 promise.

17 The question of the ten boxes in and the ten boxes  
18 out which was discussed yesterday, only this morning a  
19 counselor named Mr. Cotton, C O T T O N, as I understand it,  
20 told Mr. Fanchini that that was physically impossible. I am  
21 putting it on the record but I will attempt to work this out  
22 with Mr. Johnson who said it was possible.

23 THE COURT: Yes. The Bureau of Prisons is not the  
24 easiest group to deal with. Come on back if you can't solve  
25 it among yourselves.

1 All right.

2 MR. TISCIONE: Thank you.

3 THE COURT: We will take a brief recess and then I  
4 will call the next case.

5 (Matter concludes.)  
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